

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
and FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE
COMMUNICATIONS, INC., and N-TRIPLE C INC.,
UNITED STATES OF AMERICA, DATA TRANSMISSION
COMPANY (DATRAN), and SOUTHERN PACIFIC COM-
MUNICATIONS COMPANY, *Respondents.*

On Petitions for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**SUPPLEMENTAL BRIEF FOR THE RESPONDENT
SOUTHERN PACIFIC COMMUNICATIONS
COMPANY IN OPPOSITION**

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Nos. 77-420, 77-421, and 77-436

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This supplemental brief for the respondent South-
ern Pacific Communications Company in opposition
is directed solely to the Memorandum of the United
States stating that this Court should grant review be-
cause the decision of the court of appeals presents im-

portant issues as to services which may be offered by specialized carriers under certificates granted under Section 214 of the Communications Act (p. 6). The Memorandum acknowledges that the decision of the court of appeals rests upon substantial grounds, and reserves the position of the United States on the merits (*ibid.*).

1. The Memorandum appears to suggest (p. 6) that the United States supports the grant of review because it supported the Commission in the court below. However, the failure of the Government to anticipate the reasoning of the court below which it now concedes "rests upon substantial grounds" (*ibid.*) is hardly an adequate reason for review. The Government's evaluation of the lower court's decision, and its reservation of its position on the merits, constitute a recognition by the Government that the court of appeals may well have been correct in its decision on the merits. The limited resources of this Court should not be invoked in order to secure this Court's affirmance of lower court decisions.

2. The Memorandum fails completely to address the question why review by this Court *at this time* would be appropriate. The court of appeals has explicitly left to the Commission's decision in an appropriate proceeding (Pet. App. at 30a) the extent to which the certificates of specialized carriers should be limited. The Commission has not yet undertaken to conduct this proceeding. The Memorandum concedes (p. 5) that the Commission has not made the affirmative determination necessary under Section 214(c) of the Act that "the public convenience and necessity * * * require" that limitations be imposed upon specialized carrier certificates. Until the Commission makes this determi-

nation in an appropriate proceeding, review by this Court would be premature, and based on a wholly inadequate record on the public convenience and necessity issues. A grant of the petitions will delay substantially the resolution by the Commission of these important issues. A denial of the petitions will provide the best assurance that a proceeding will be initiated and conducted expeditiously by the Commission, and presented to this Court opportunely on an adequate record.

3. The Memorandum states that the Third¹ and Ninth² Circuits have viewed the Commission's *Specialized Common Carrier*³ decision as involving only private line service (p. 5). Both courts affirmed Commission decisions *extending* competition by specialized carriers. Neither imposed any restrictions on the services and facilities which could be provided, or reached the question whether the public convenience and necessity require that limitations be imposed (see Southern Pacific Communications Company brief in opposition, pp. 7-9).

4. The issue is not whether the Commission and the carriers described the specialized carrier services in terms of private line services, but whether the Commis-

¹ *Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3rd Cir. 1974), cert. denied, *AT&T v. FCC*, 422 U.S. 1026 (1975), rehearing denied, 423 U.S. 886 (1975).

² *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1975), cert. denied, *National Assn. of Regulatory Utility Commissioners v. FCC*, 423 U.S. 836 (1974).

³ *Specialized Common Carrier Services*, Docket No. 18920, 29 F.C.C.2d 870 (1971), reconsideration denied, 31 F.C.C.2d 1106 (1971).

sion has effectively limited their offering to private line by making the affirmative determination required by statute that the public convenience and necessity so require. The Commission granted certificates of public convenience and necessity to specialized carriers for the lines or facilities "applied for" under Section 214(c) of the Communications Act. It is undisputed that it made no affirmative determination then or at any other time, as also provided under the same subsection of the Act, that "the public convenience and necessity * * * require" that limitations be placed upon their use of the lines or facilities.

Respectfully submitted,

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